PUBLIC PROSECUTOR

v.

SAMSUL KAMAR MOHD. ZAIN

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL TRIAL NO. 22 OF 1984]
5 FEBRUARY 1988

CRIMINAL LAW AND PROCEDURE: *Trafficking in 24.22 grammes of heroin - Prima facie case - Presumption against accused - Rebuttal - Defence of own consumption - Sentence of death.*

EVIDENCE: *Cautioned statement - Corroboration - Inconsistencies in evidence.*

The accused was charged with trafficking on his own behalf a dangerous drug, to wit, 24.22 grammes of heroin in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 punishable with death under s. 39B(2) of the same Act. On 7 May 1984 at 10.20 p.m., PW1 and PW6 and two other police personnel, all in civilian clothes, went to Complex Kota Raya, Jalan Tan Cheng Lock, Kuala Lumpur, where they saw the accused and PW5 sitting on a bench. After identifying himself, PW1 made a search of the accused and found from his left trousers' pocket a package wrapped in a piece of Chinese newspaper containing seven plastic packets, which was suspected to be heroin. From the right trousers' pocket PW1 recovered a plastic bag which contained ten plastic pockets also suspected to be heroin. PW1 then searched PW5 but found nothing incriminating on him. The accused and PW5 were arrested. The 17 packets were sent to the Chemist and the contents were found to be 24.22 grammes of heroin.

At the trial, the accused gave evidence on oath. The gist of the accused's defence was that the ten packets in the plastic bag were meant for his own consumption and that the other package belonged to PW5. These two packages were found on the bench and not on his person. In the course of the trial the accused's testimony became inconsistent and he admitted that the plastic bag was in his right trousers' pocket and not on the bench.

Held:

[1] In the light of all the evidence in the case, the accused had failed to raise a reasonable doubt in the prosecution's case. The Court was satisfied as to the truth of the evidence given by PW1 and PW6. The story of the accused was a pure invention which was reflected from the inconsistencies in his evidence.

[2] The amount of heroin was far too much to be used for accused's own consumption and on the balance of probabilities the accused was found guilty of trafficking and convicted.

[Accused sentenced to death.]

Legislation referred to:
Criminal Procedure Code, s. 117
Dangerous Drugs Act 1952, ss. 37(da)(i), 39B(1)(a), 39B(2)
Evidence Act 1950, s. 157

For the public prosecutor - Foo Lee Mei, DPP
For the accused - Terrance Marbeck; M/s. Yusof Lee Pathma & Marbeck

JUDGMENT

KC Vohrah J:

The accused was charged as follows:

> That you on 7 May 1984 at about 10.20 p.m. at Complex Kota Raya, Jalan Tan Cheng Lock, in the city of Kuala Lumpur, in the Federal Territory, did on your own behalf traffic in Dangerous Drugs to wit heroin weighing a total of 24.22 grammes and you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s. 39B(2) of the same Act.

The main prosecution witness, Inspector Yusof bin Hj. Tahir (PW1), stated that on 7 May 1984 at about 10.20 p.m. he went with Inspector Mohd. Yusof bin Mohamed (PW6) and two other police personnel, all in civilian clothes, to Complex Kota Raya, Jalan Tan Cheng Lock, Kuala Lumpur. On arrival at the place he saw two male Malays sitting on a bench outside the complex and the police party approached them. He identified himself as a police officer and conducted a body search on both of them. He searched the accused's first. He found a package wrapped in a piece of Chinese newspaper (P6) in the accused's left trouser pocket. When he unwrapped the package he found that it held 7 plastic packets (P7A to G) which he suspected contained heroin.

He continued his search on the accused and recovered from the accuseds' right trouser pocket a plastic bag (P8). He unwrapped it and found that it held 10 plastic packets (P9A to J) which he suspected to contain heroin.

PW1 then searched the other male Malay, Azmi (PW5), who sat beside the accused on the bench but nothing incriminating was found on this person.

After that he arrested both the accused and Azmi.

Under cross-examination PW1 stated that an informer accompanied the police party to Complex Kota Raya and pointed out to him the accused who was sitting on the bench before PW1 made a body search on the accused.

Inspector Yusof bin Mohamad, PW6, who accompanied PW1 and the police party that night, corroborated the evidence of PW1 that the accused was sitting together with Azmi, PW5, on a bench in front of the complex. He confirmed that PW1 searched both the accused and Azmi (PW5) and that the accused was searched first. He confirmed the recovery of the bundle wrapped in a piece of newspaper containing 7 plastic packets from the accused's left pocket and a plastic bundle containing 10 plastic packets from the accused's right trouser pocket. He also confirmed that PW1 brought along an informer for the raid.

Azmi, PW5, also confirmed that he sat beside the accused on the bench. He said that he was having a conversation with the accused at that time. He saw PW1 search the accused first and saw him take out plastic packages from the trousers pockets of the accused. He said he could not describe both the packages as the incident took place a long time age. He added he too was searched and that "they found nothing on me."

Inspector Moktar, PW3, the investigating officer of the case, related to the Court that he received a newspaper wrapping (P6) containing the 7 plastic packets (P7A to G) and a plastic bag (P8) with the 10 plastic packets (P9A to J) from PW1. The 17 plastic packets contained a substance suspected to be heroin. He then sent them to the chemist (PW4) on 10 May 1984 in two sealed envelopes marked "A" and "B" respectively. He said he received back these two envelopes sealed with the chemist seal. The two envelopes (P4 and P5) sealed

with the Department of Chemistry's seals were cut open by PW1 in Court when he was requested to identify the piece of newspaper and 7 plastic packets wrapped in it (contained in P4) and the plastic bag containing 10 plastic packets (contained in P5).

The Chemist, PW4, gave a report of the analysis he made of the contents of the 17 plastic packets. His evidence was that the substance in the 17 plastic packets contained 24.22 grammes of heroin, a dangerous drug listed in List I of the First Schedule to the Dangerous Drugs Act 1952.

Before I proceed to examine whether a *prima facie* case under s. 39B(2) of the Dangerous Drugs Act 1952 has been made out it would be necessary at this stage to examine the line of cross-examination made by defence Counsel.

The cross-examination of the main prosecution witnesses were meant to show that the accused did not have possession of the drugs; that at that time he was playing with a "game watch" electronic device and the two packets were lying on the bench; that he did not have the two packages of drugs on his person - that in fact he was wearing a slim-fit pair of trousers and that the 2 packages of drugs could not possibly have got into the pockets of his trousers together with the other personal things like his NRIC, keys and purse he had on his person; that the pair of trousers which were produced in Court was not the one he was wearing that day. Questions were directed to show that Azmi was not the innocent person he appeared to be; if nothing was found on him why was he arrested? It was alleged that Azmi has possession of the drugs and that because Azmi escaped from police custody the police had pinned the possession of the drugs on the accused. It was implied that the police took RM3,000 which it was alleged Azmi had on him at the time of Azmi's arrest.

PW1 and PW6 denied that the drugs were found on the bench and not found on the accused's person. PW1 explained that no search list was prepared as the drugs were found on the accused's person. PW1 folded the packages he found into their original sizes and each appeared to be small enough to go into each of the trousers pockets. The IO said that he did not test if the packages would go into the trousers pocket because of their size (each approximately 3½" x 4½"); each could go into one pocket. The IO testified that the pair of trousers, a very light grey pair, was taken off the accused after he had brought the accused to a house in Gombak on 10 May 1984 where he had taken another pair from the house for the accused to change into. He had custody of the pair of trousers which he took from the accused from that date till he produced it in Court.

The IO was also questioned as to the fact that in Police Form 56 which was used to record personal items of prisoners in lockups, the colour of the pants of the accused was put down as white. The person who recorded this was not called but the fact remains that the pair of pants was a light grey pair and a mistake of the colour could well have been made by the recorder. PW6 Inspector Yusof who was in the police party that arrested the accused was positive that the accused wore a pair of light grey pants.

As regards the allegation that he had an electronic device, a "game watch", in his hand PW1 was adamant that accused did not hold one. Azmi who was cross-examined on this said he could not remember if the accused was with such a device. PW6 was not asked about the electronic device.

Regarding the questions on Azmi's complicity in the possession of the drugs, Azmi (PW5) denied that he was in possession of the drugs. He was not asked if the two packages of drugs were lying on the bench as was put to PW1. Instead he was asked if one package

was on the bench and which he denied. Azmi said that he himself asked to be involved in a follow up project on 8 May 1984 after he had been detained under s. 117 of the CPC as he was then a drug addict and used to give information to the police. He said that he took part in the project at Setapak from 8 p.m. to 12 p.m. to arrest a towkey who supplied drugs but the project proved abortive. He denied he escaped from police custody on 8 May 1984. He said he was released on a personal bond of RM500 by the Deputy OCCI of Anti Dadah Section on 9 May 1984. He readily admitted that he had been a small time seller of drugs and that some time after his arrest he had been sent to Pusat Insaf Diri Tampoi after a urine test.

Azmi was not asked about the RM3,000 on his person on the day of his arrest. Defence had put to Inspector Mohd.Yusof (PW6) one of the officers in the police party which arrested the accused, that RM3,000 was found on Azmi in the inquiry office. PW6 denied this.

There was great play that Azmi has escaped from custody. As stated earlier Azmi had denied this; he said after the follow up project on 8 May 1984 he was released on personal bond. PW2 the IO of the case and Inspector Yusof (PW6) denied that the accused escaped from police custody. At first however PW2 agreed that Azmi escaped but it became clear at the later stage of the evidence that as he was not involved in the follow up project he was not sure whether Azmi escaped, only that Azmi had been given "jamin" to do the follow up operation. He said what he meant by "Jamin" was that Azmi was allowed "permission" to do the follow up project. PW6 who conducted the "project" with Azmi on 8 May 1984 said after he had interrogated Azmi he was satisfied that Azmi could help the Anti Narcotic Division to arrest a drug trafficker and that Azmi volunteered himself for the project. He said that on the instructions of the Deputy OCCI, Anti Narcotics Section, ACP Hashim bin Hassan, (DW2), he released Azmi on bail on the afternoon of 8 May 1984 in order to make him feel easy and relaxed for the follow up operation. He said a cautioned statement was recorded from Azmi in the morning of 9 May 1984 and subsequently Azmi contacted him a few times in the office. So far as the prosecution's case is concerned, at the close of it, I was satisfied nothing in the evidence elicited during the cross-examination of the witnesses had showed that the evidence as regards the possession by the accused of the two packages containing 24.22 grammes of heroin as being inherently incredible on a *prima facie* basis. The onus was therefore on the accused to rebut the presumptions that he knew the nature of the drug and that he was trafficking in it.

The accused elected to give evidence on oath. He admitted to the possession of the package, the plastic package not the newspaper package, of heroin. He admitted that the plastic package was in his **right trouser pocket**. He said the newspaper package belonged to Azmi and that Azmi had placed it on the bench beside him (Azmi).

He said that on day at about 9.40 p.m. he was seated on a bench waiting for Azmi. At about 9.45 p.m. a Chinese towkey, whom he had promised to meet, came along and handed him two packages, one a plastic package for him and a newspaper package for Azmi which the towkey requested him to pass to Azmi who had not arrived there. The accused said he inserted the plastic package into his right trouser pocket.

After the Chinese man had left the accused went back to the bench and waited for Azmi. Azmi came after 2 minutes and he passed the newspaper package to him. After that both of them sat down on the bench and Azmi put this package by his side on the bench. The accused said he did not know what was in the newspaper package.

He and Azmi chatted for 5 to 10 minutes and then the police came and searched him and Azmi. He said the police found the plastic package containing the drugs in his right trouser pocket and in his left trouser pocket they found a toy (a electronic device, a "game watch").

He said he knew that plastic package contained 10 packets of heroin and that he had paid RM250 in advance for the drugs which were meant for his own consumption as he was a drug addict.

He said that Azmi and he were brought to the police station and he and Azmi together with one Zulkifli (DW4) and one Kit were put in one lockup. He said that that night,

> "Azmi called me and asked me to admit to the newspaper packet by his side to be mine. And Azmi told me he wanted to make a trap for the said towkey. And should the Chinese towkey be arrested, the police would add the drugs that were found on the chinese man".

He said he told Azmi that he did not even know the house where the Chinese man stayed and that he (the accused) was only responsible for the plastic package found, not the newspaper package.

The following day he and Azmi were brought before a Magistrate where they were both remanded for 5 days under s. 117 of the CPC. Then they were taken back to Jalan Bandar Police Station where he saw several police personnel including PW1, PW3 and PW6. PW6, drew a plan of the location where they wanted to arrest the towkey that night. He said Azmi was taken back to the lockup for a while and at about 5 to 6 p.m. he was taken out alone. During the period he was in the lockup Azmi told him that he (Azmi) had organised a project to arrest the towkey.

Defence called 3 witnesses, Zulkifli (DW4) one of his cell mates on 7 May 1984, and three police witnesses, ACP Hashim (DW2), the officer in charge of the Anti Narcotics Division, Inspector Shamsuddin bin Yacob (DW3) who applied for the detention of Azmi and the accused under s. 117 of CPC on 8 May 1984 and Inspector Ahmad bin Nordin (DW5) the officer who recorded a cautioned statement from the accused. PW2, Inspector Mokhtar, the IO of the case was also re-called for cross-examination.

Zulkifli (DW4) in his evidence said that on 7 May 1984 he was detained in the same lockup with the accused together with one Chinese male and one Danny. The accused had already stated that Azmi was also known as Danny. DW4 said he heard Danny say to the accused, "I'll be a police informer and I will try to get the Chinese towkey arrested." He said that Danny said he planned to escape and if he managed to escape he would contact the accused's family. He said Danny said, "The things I don't know what they are, in the meantime you just admit they are yours." He said there was an argument between Danny and the accused and Danny said, "One thing belongs to me - I admit but I do not know about the other barang." He said the accused told Danny, "I will admit the thing belonging to me. Your thing you admit."

Zulkifli was asked if he had heard anything before the accused and Danny were put into the lockup and he said he heard Danny say, "If I manage to escape don't worry - I have RM3,000."

He said the next night i.e. the night of 8 May 1984, two persons came up to the lockup and shouted repeatedly, "Su, where is Danny's house?" They were there 10 to 15 minutes and they scolded the accused. He said at that time Danny was not in the lockup.

I come now to the evaluation of the evidence.

As regard the accused's evidence that Azmi had placed the newspaper package by his side on the bench the evidence of PW1 and PW6 was clear that the newspaper package was not found on the bench, quite contrary to the accused's story; both packages were in his pockets. In fact much was made of the allegation that the accused was wearing a pair of slim cut trousers the pockets of which could not contain the packages. But as was pointed out, in his defence the story changed to one of his having only the plastic package in his right pocket, the other pocket having an electronic device "a game watch" which meant inferring from what the accused said the other package could not have been in that pocket. It will be remembered that it was put to PW1 that the accused had the device in his hand. So much for the slim cut trousers and the electronic device.

It will be remembered that Azmi, PW5, himself denied being in possession of the drugs. In fact Azmi stated that he saw PW1 search the accused and recover 2 plastic packages from the accused's trousers pockets. While there was a discrepancy in his evidence that both the packages were plastic packages when all the other evidence showed that there was one plastic package and another newspaper package his explanation, that he could not describe both the packages because the incident took place a long time ago, was a perfectly plausible explanation.

There was an attempt to show that Azmi was not as innocent as the prosecution appeared to show him to be and that he was in possession of the newspaper package of drugs that night. That was the effect of the accused's and Zulkifli's evidence.

But Azmi's evidence was quite clear - that he had stopped to chat with the accused that night when the police ambushed the accused and him. His evidence that he and the accused were searched was borne out by the evidence of PW1 and PW6. His evidence that both the packages of drugs were recovered from the accused's trouser's pockets was also borne out by PW1 and PW6. His admission that he helped the police in an operation on the night of 8 May 1984 was borne out by the evidence of PW6. ACP Hashim, DW2, who was then in charge of the Anti Narcotics Division stated in Court that he instructed PW6 that if anyone of the two who had been arrested had nothing (i.e. no drugs on him) Inspector Yusof should allow that person to go on bail in order to carry out further investigations and getting more information. The evidence of PW6 was that after he had interrogated Azmi (who in his evidence confessed he was a small drug dealer and an addict) he was satisfied that Azmi could assist the Anti Narcotics Division to arrest a drug trafficker and this aspect of the evidence showed the reason why Azmi was used by the police - it nullified the allegation that although Azmi was caught with a package of drugs he escaped and therefore the police had to pin the offence of trafficking in both packages of heroin on the accused.

Before I go further I would like to deal with the point raised by defence Counsel that if Azmi had been remanded for 5 days under s. 117 of the Criminal Procedure Code on 8 May 1984 (and this was clear from the evidence of Inspector Shamsuddin (DW3)) why was it that Azmi was released on bail the same day? ACP Hashim had stated that had he known that Azmi had been remanded he would not have ordered him to be released on bail. But the point is Azmi was released on bail. Whether his release was right or wrong in law is not in issue. What matters is that the overwhelming evidence is that he was released on bail.

In any event Azmi denied he escaped - he said he was released on bond though he said that was on 9 May 1984. While at first Inspector Moktar, PW3, was not clear whether Azmi escaped, from the rest of PW3's evidence it became apparent that Azmi in fact had permission to go along for the project and when he was recalled by the defence he stated that it was

in his diary that he was informed by ACP Hashim that Azmi had been granted bail. PW6's evidence was clear that ACP Hashim had directed him to release Azmi on bail and he released Azmi on bail on 8 May 1984. While the bail bond was not produced in Court and although much was made of the wrong bail bond being used the point is Azmi was released on bail whatever may have been the inadequacies in law for so doing for the purpose of the project. There was a discrepancy between Azmi's evidence and that of PW6 as to when Azmi was released but to my mind there could have been a genuine mistake on the date. According to PW6 a cautioned statement was recorded from Azmi on 9 May 1984 and Azmi contacted him a few times after release and that could have meant Azmi did not escape.

As regards the evidence of Zulkifli I found it difficult to believe. In his examination-in-chief he said he heard Danny (Azmi) say, "The things I don't know what they are, in the meantime you admit they are yours." Now Azmi who was heard to say he did not know what the "things" were was heard to say later, "One thing belongs to me - I admit but I do not know the other barang."

Under cross-examination he said he could not remember what he was doing when the accused and Azmi were brought into his cell; he could not even tell whether he was sleeping. He said that at the beginning both of them were quarrelling and the accused told Azmi, "This thing I admit, the other you have to answer for that." Yet he was not sure what transpired before that. Although in the examination-in-chief he said he heard Azmi tell the accused before they were put into the lockup, "If I manage to escape don't worry - I have RM3,000" yet under cross-examination he said he did not hear any conversation before they were put in the lockup. He said he heard the matter regarding "RM3,000 plus" but this was inside the lockup. None of these matters were even put to Azmi when he gave evidence. He was not even asked generally about the matter of the RM3,000. Zulkifli's evidence that the police came to the cell on 8 May 1984 and asked the accused for Azmi's address was not borne out by the accused's evidence. In any event Azmi had himself stated he was a police informer and it is unlikely the police did not know his address. The attempt by Zulkifli to bolster the accused's allegation that Azmi escaped on the night of 8 May 1984 was certainly not borne out by Azmi (PW5) who denied he escaped and by PW6 who said, as stated earlier, that a cautioned statement was recorded from Azmi on 9 May 1984. To my mind Zulkifli had come to give evidence merely to help the accused regardless of the truth of what happened at the cell the night of 7 and 8 May 1984.

I now turn to the facts in a cautioned statement made by the accused which appeared to corroborate his testimony on those facts. I allowed Inspector Ahmad, DW5, called by the defence, to give evidence on some facts appearing in a part of a cautioned statement which the defence stated was voluntarily made by the accused to corroborate under s. 157 of the Evidence Act 1950 some facts given in the accused's evidence. Defence Counsel had claimed that the first part of the cautioned statement was voluntarily made by the accused but that the distinct and separate later part of the statement was not voluntarily made. I overruled the objection of the DPP to the use of the first part. My ruling appears in Annex A to this judgment.

DW5 read the relevant parts of the statement which showed that the accused stated that a Chinese man had come and given him a package the contents of which he did not know and that the Chinese man reminded him to hand over the package to Danny (Azmi). It was also stated by the accused that Danny arrived at 10.20 p.m. and immediately the police ambushed them. It was also stated by the accused that while the search was going on they (the police) discovered a package containing drugs from the left pocket of his trousers.

Superficially the facts appear to corroborate the same matters in his testimony, that there was a Chinese man who handed him a package of drugs for Azmi, that Azmi arrived there and that one package containing drugs was discovered in his pocket. But whereas in his evidence he said that after Azmi arrived he and Azmi had a chat for 5 to 10 minutes before the police ambushed them, in the cautioned statement he stated that as soon as Azmi arrived at 10.20 p.m. the police ambushed them. Then whereas he said in evidence that he kept the plastic package of drugs in his right pocket and the police only discovered that package in his right pocket, in his cautioned statement he said the police discovered a package in his left pocket. I did not think the relevant portions of the cautioned statement corroborated the material facts in his evidence. In the face of the evidence of PW1 and PW6 that the accused had a plastic package of drugs in his right pocket and a newspaper package of drugs in his left pocket and of the evidence of Azmi that he had nothing to do with the drugs, all of which I have evaluated and found to be consistent with no reasonable doubt being created in the prosecution's case, I reject that part of the cautioned statement relating to Azmi and to the one package being found in the left trouser pocket.

The accused put up a defence primarily in an attempt to escape the effect of the presumption in s. 37(da)(i) of the Dangerous Drugs Act 1952 that he was trafficking in heroin. He admitted possession of the heroin in the plastic bag which came to 13.71 grammes of heroin and disclaimed knowledge of the newspaper package containing 10.51 grammes of heroin; added together the heroin came to 24.22 grammes falling within the presumptive amount for trafficking in s. 37(da)(i). But his defence is hollow and flies in the face of clear and unshaken evidence that both packages of heroin were found on his person. There is nothing in his evidence, which was an attempt to shift possession of the newspaper package containing heroin on to Azmi, which has created a reasonable doubt on the prosecution's case that the two packages were discovered on him.

To my mind, too, the two packages being found on him, he, on his admission that he knew the plastic package to contain heroin, must, on a balance of probabilities, have know that the newspaper package contained heroin.

His story that he received the two packages from a Chinese towkey that night may be true though, as explained earlier, the story that one package was for Azmi was a pure invention on the part of the accused. The amount of heroin was far too large and required an outlay beyond his means to be used for his own consumption and on a balance of probabilities I find that he was trafficking in the said heroin.

I find him guilty and convict him.

Also found at [1988] 1 CLJ 542